

1 that only 1.0 percent of California respondents (3/286) for the test group
 2 (DMV.ORG stimuli) identified DMV.ORG as affiliated with the
 3 DMV/state/government (again, in either direction) whereas 2.5 percent of California
 4 respondents (5/197) for the control group (CAR.ORG stimuli) identified CAR.ORG
 5 as affiliated with the DMV/state/government. [DF 76.]

6 Not a single respondent residing in any of the four other tested states
 7 (that do not use the "DMV" moniker) perceived DMV.ORG as affiliated with the
 8 government, whereas 2.0 percent of respondents in the non-DMV states identified
 9 the control, CAR.ORG, as affiliated with the DMV/state/government. [DF 77.]

10 This data demonstrates that Maronick's results cannot be extrapolated to states that
 11 do not use the DMV moniker.

12 By subtracting the Hollander control group findings from the test group
 13 findings, it is apparent that no confusion as to source can reasonably be attributed to
 14 the use of the DMV.ORG domain name. [DF 78.]

15 **3.3. No Evidence Of Intent To Deceive**

16 There is also no evidence to support a finding that any of the
 17 defendants intended to mislead consumers. Instead, the evidence shows that:

- 18 • DMV.ORG has always utilized disclaimers and clarifying language [DF 64];
- 19 • DMV.ORG's sponsored listings have always resembled organic listings that
 20 Google and Yahoo post for DMV.ORG, suggesting that search engines view
 21 those descriptions as reasonable [DF 62];
- 22 • DMV.ORG's use of disclaimers and clarifying language substantially exceeds
 23 what is done, or not done, by others including plaintiffs [DF 65]; and
- 24 • Online Guru has made voluntary changes to reinforce the message that there
 25 is no affiliation with the government [DF 66].

26 Moreover, the fact that the term "DMV" is generic, as demonstrated by
 27 California's disclaimer in its federal trademark registration and the use of the term
 28 by other states, supports defendants' right to use the "DMV" acronym in their

1 website domain. [DF 29.]

2 Finally, defendants' innocent use of the "DMV" moniker on their
3 website and as part of the domain name is further supported by the facts that:
4 (a) despite agitation, no other state has joined this action; (b) the state of Georgia
5 found nothing misleading about DMV.ORG; (c) the State of New York considered
6 its objections to DMV.ORG closed once the state flag/seal was removed;
7 (d) Pennsylvania has entered a linking agreement with defendants, expressly
8 affirming DMV.ORG's right to link to the state motor vehicle website; (e) many
9 states voluntarily provide DMV.ORG with updated information; (f) other websites
10 employ the "DMV" acronym in their domains; and (g) even plaintiffs have
11 registered and used domains containing the "DMV" acronym. [DF 54-59, 125;
12 Defendants' RJN, Items 11-12.]

13 **3.4. No Proof That DMV.ORG Affects The Purchasing Decision**

14 To succeed on a false advertising claim, Plaintiffs must also prove that
15 the misleading advertising is material, that is, it must affect the purchasing decision.
16 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

17 Plaintiffs allege that DMV.ORG misleads consumers to believe that the
18 site is affiliated with/endorsed by the government, thereby impelling consumers to
19 purchase the courses advertised on DMV.ORG instead of Plaintiffs' courses. But,
20 Plaintiffs have failed to produce any credible evidence demonstrating that
21 endorsement by a state would be or is material to the purchasing decision.

22 Significantly, Plaintiffs' expert, Maronick, understood the phrase
23 "recommended by the DMV," which he used in his fourth survey, to mean only that
24 a traffic school course would serve to discharge a traffic ticket. [DF 84.]

25 There is a critical distinction between these two questions: (a) is the
26 school/course approved in the sense that it will serve the intended purpose (e.g.,
27 mask the traffic ticket points/satisfy the driver's ed requirement)? and (b) is the
28 school endorsed by the state, over other schools that will serve the intended

1 purpose? By conflating these two concepts, Maronick concedes that his survey on
2 this point, which led respondents to the answer he wanted, cannot be relied upon.

3 Defendants concede that a course must serve the intended purpose -
4 such a characteristic is indisputably material. At the same time, however, there is no
5 evidence that consumers care more about government endorsement of one
6 acceptable traffic school course over another acceptable traffic school (that is not
7 endorsed, but still will be acceptable). [DF 83.] Rather, the fact that online traffic
8 schools are proliferating in California coupled with the fact that the state does not
9 endorse any such course is evidence that consumers do not value an endorsement.

10 Beyond whether the course will serve the intended purpose, other
11 factors unrelated to government endorsement appear to be material to the purchasing
12 decision. As Plaintiffs' expert agreed from his twenty years of experience with
13 college students, college students are generally interested in completing traffic
14 school as quickly and cheaply as possible. [DF 86.]

15 Similarly, traffic school search engine listings prominently display
16 price (e.g., Go to Traffic School – Starting at \$14.50; Traffic School – Starting at
17 \$9.95; Traffic School - \$10 Special, etc.). [DF 89.] And, the fact that numerous
18 traffic schools convey information about the price in their name (e.g., "Cheap
19 School," "LowestPriceTrafficSchool.com") strongly suggest that price is a critical
20 factor in the purchasing decision. [DF 89.] And, as agreed by Plaintiffs' principal,
21 Eric Creditor, convenience of a traffic school course is an important factor. [DF 88.]

22 Plaintiffs' thesis in this case is that a visitor to the DMV.ORG website
23 interested in traffic school is more likely to purchase the traffic school advertised on
24 the website due to the perceived affiliation. This perception, Plaintiffs' allege,
25 conveys an unfair advantage to Plaintiffs' competitors that advertise on the
26 DMV.ORG website. If this thesis was accurate, then the effect of the alleged
27 implied endorsement should be traceable in terms of higher conversion rates, that is
28 better conversion of visitors to purchasers for DMV.ORG advertisers as compared

1 to traffic schools without such advertising.

2 Unfortunately for Plaintiffs, the facts do not support this thesis.

3 First, Plaintiffs themselves have always viewed the traffic from
4 DMV.ORG as "unqualified," believing that it is less likely than other traffic to
5 produce paying customers. [DF 94-95.] This testimony contradicts the thesis that
6 the perception of an endorsement materially impacts the purchasing decision.

7 Apart from Plaintiffs' admissions on this point, the actual conversion
8 rates show that, whether measured by page views or unique visitors, DMV.ORG's
9 conversion rates are below those realized by Plaintiffs. [Cf. DF 93 (TS.com
10 converts at 10-15%) with DF 96-97 (DMV.ORG ads convert at a 3.25-7.5%).]

11 Moreover, if the alleged perception was improving conversion, some
12 decline would have been expected with the incremental addition of disclaimers.
13 [Recall DF 75 (Warren agrees that revised logo "not confusing").] But this thesis is
14 further undermined by the facts showing that DMV.ORG conversion rates have not
15 declined despite the addition of redundant disclaimers. [Moretti Trial Decl., ¶ 21
16 (no change in conversion rates from 2006, rising modestly over time).]

17 The evidence on conversion, both anecdotal and statistical, shows there
18 is no unfair advantage stemming from perceived affiliation. In short Plaintiffs have
19 failed to prove that affiliation with the state motor vehicle departments is material to
20 the purchasing decision. Cf. Pizza Hut, Inc. v. Papa John's Intern., Inc., 227 F.3d
21 489, 504 (5th Cir. 2000) (judgment for defendant, plaintiff failed to prove misleading
22 slogan "Better Ingredients-Better Pizza" was material to purchasing decision).

23 **3.5. Plaintiffs Have Not Shown Any Causal Connection Between The** 24 **Alleged False Advertising And Their Purported Injuries**

25 Plaintiffs must prove "a logical causal connection between the alleged
26 false advertising and [their] own sales position." Century 21 Real Estate Corp. v.
27 Re/Max South County, 882 F.Supp. 915, 924-25 (C.D. Cal. 1994); see also Nikkal
28 Industries Ltd. v. Salton, Inc., 735 F.Supp. 1227, 1238 (S.D.N.Y. 1990) (plaintiff

1 failed to prove lost sales were the result of defendant's advertisements rather than
 2 other factors such as its marketing and increased competition). A "mere subjective
 3 believe that [they] will be injured" is insufficient. Century 21, 882 F.Supp. at 925.

4 Plaintiffs have offered no expert testimony correlating any decline in
 5 their business to the DMV.ORG website. And, several other plausible explanations
 6 exist for Plaintiffs' modest decline in sales, including:

- 7 • Increased competition in the online traffic school and drivers education
- 8 market, including lower prices offered by other traffic schools;
- 9 • Plaintiffs' decrease in their search engine marketing expenditures and increase
- 10 in radio advertising expenditures;
- 11 • Plaintiffs' reduction in marketing expenditures to pay for this litigation; and
- 12 • Plaintiffs' decision to transition from receiving referral fees in Texas and
- 13 Florida to actually selling the courses, collecting the money, and paying third
- 14 parties for fulfillment, correlating in different years with a drop in the number
- 15 of courses sold in each of those states.

16 [DF 99-106.] There is no reason to believe that any of these factors has not
 17 impacted Plaintiffs' businesses. Plaintiffs' subjective belief that DMV.ORG is the
 18 cause of decline is simply insufficient.

19 To summarize, Plaintiffs have failed to carry their burden to prove any
 20 of these four elements of their Lanham Act and therefore judgment should be
 21 entered in Defendants' favor.

22 **4. Plaintiffs' Cal. Bus. & Prof. Code § 17200 Claim Fails**

23 Cal. Bus. & Prof. Code § 17200 et seq. (the "UCL") precludes standing
 24 unless such person (other than government) has "suffered injury in fact and [has]
 25 lost money or property as a result of [the] unfair competition." Cal. Bus. & Prof.
 26 Code § 17204; Meyer v. Sprint Spectrum L.P., 150 Cal.App.4th 1136, 1140 (2007).

27 Under the new standing requirements, courts have determined that "a
 28 plaintiff suffers an injury in fact . . . when he or she has (1) expended money due to

1 the defendant's acts of unfair competition; (2) lost money or property; or (3) been
2 denied money to which he or she has a cognizable claim." Id. at 1142-43.

3 Plaintiffs have failed to produce any evidence to meet these standing
4 requirements and accordingly this cause of action fails.

5 In the event the Court finds that plaintiffs meet the standing
6 requirements for a 17200 claim, their false advertising claim fails for the same
7 reasons that their Lanham Act false advertising claim fails. Int'l. Order of Job's
8 Daughters v. Lindeburg, 633 F.2d 912, 916 (9th Cir. 1980) ("Federal and state laws
9 regarding trademarks and related claims of unfair competition are substantially
10 congruent.") And, to the extent Plaintiffs base their 17200 claim on Cal. Vehicle
11 Code § 25 and/or the California Consumer Legal Remedies Act (Cal. Civ. Code
12 § 1750 et seq.), such reliance on those statutory provisions is improper since
13 plaintiffs never raised these allegations in the operative pleading. [See Defs'
14 Memorandum of Fact and Law, pp. 7-8.]

15 **5. Defendants Have Established Plaintiffs' Unclean Hands**

16 The doctrine of unclean hands precludes relief to a party that has acted
17 improperly in a related matter. Urecal Corp. v. Masters, 413 F.Supp. 873, 875 (N.D.
18 Ill. 1976). "It is the age-old policy of courts of equity to require that he who sues
19 seeking equity must . . . come into court with 'clean hands' as respects that
20 controversy." Hall v. Wright, 125 F.Supp. 269, 273 (S.D. Cal. 1954).

21 To establish unclean hands, a defendant must establish that the
22 plaintiff's conduct is inequitable and that the conduct relates to the subject matter of
23 the claims. Fuddrucker, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 847 (9th Cir.
24 1987). In Haagen-Dazs v. Frusen Gladje, Ltd., 493 F.Supp. 73, 75-76 (S.D.N.Y.
25 1980), for example, plaintiff was denied a preliminary injunction, seeking to enjoin
26 defendant from packaging its domestic ice cream so as to appear to be of Swedish
27 origin. Plaintiffs' hands were deemed "unclean" because plaintiff itself packaged its
28 domestic ice cream to appear to be of Scandinavian origin. Id.; see also Japan

1 Telecom, Inc. v. Japan Telecom Am., Inc., 287 F.3d 866, 870 (9th Cir. 2002)
 2 (expressly recognizing the availability of the unclean hands defense to false
 3 affiliation claims); Emco, Inc. v. Obst, 2004 U.S. Dist. LEXIS 12118, *12 (C.D.
 4 Cal. 2004) (holding that the unclean hands doctrine provides a defense to false
 5 advertising claims under the Lanham Act).

6 Plaintiffs' conduct is arguably worse than the alleged conduct of which
 7 they complain. Consider:

- 8 • Registration and use of the domains dmvapprovedtrafficschool.com and
 9 cadmvtrafficschool.com (though the California Department of Motor
 10 Vehicles does not license or approve online traffic schools) [DF 125];
- 11 • Registration of other domains including dmvlicenser renewal.com,
 12 dmvregistrationrenewal.com, dmvrenewals.com, internetdmv.com, dmvi.com,
 13 and trafficschool.us, with use in question [DF 127];
- 14 • Registration of online-dmv.org and internet-dmv.org, though plaintiffs could
 15 not identify a business purpose for the registration of these domains [DF 128];
- 16 • The DrivingLinks.com website, which "mirrors" the concept and content of
 17 DMV.ORG and maintains references to state motor vehicle agencies that link
 18 only to other pages on DrivingLinks.com (not a motor vehicle agency
 19 website), but lacks any disclaimer as to the lack of affiliation between
 20 DrivingLinks.com and the state motor vehicle departments or the traffic
 21 school behind the website [DF 120, 124];
- 22 • The FloridaTrafficSchool.com website, with no disclaimer as to government
 23 affiliation, including a picture of a police officer (though not endorsed by any
 24 Florida police department), with links to "Florida DHSMV resources" and to
 25 a "DHSMV Website guide" (which link to the DrivingLinks.com website, not
 26 the official state site) [DF 115-117]; and
- 27 • DriversEdDirect.com's ongoing use of various state indicia without license to
 28 do so, such as images of state license plates, logos, and state seals. [DF 113.]

1 Additionally, Plaintiffs have engaged in other conduct that might be
2 designed to mislead consumers. For example, TrafficSchool.com is advertised
3 through LowestPriceTrafficSchool.com, leading consumers to believe that
4 TrafficSchool.com offers the lowest priced traffic school in California, when in fact
5 it does not. [DF 118-119.] TrafficSchool.com also uses the term "Official Site"
6 prominently in its sponsored search engine listings, arguably to improve its own
7 click-through rate by suggesting a government affiliation. [DF 114.]

8 Plaintiffs' conduct is arguably worse than the alleged conduct that they
9 complain about in this case. The doctrine of unclean hands should therefore be held
10 to bar any form of recovery for Plaintiffs.

11 **6. Defendants Have Established The Defenses Of SOL and Laches**

12 Laches bars an action for equitable relief where the defendant can show
13 unreasonable delay in bringing suit plus either acquiescence in the act about which
14 plaintiff complains or prejudice to the defendant from the delay. Transworld
15 Airlines v. American Coupon Exchange, 913 F.2d 676, 696 (9th Cir. 1990).

16 **Unreasonable Delay:** Plaintiffs have known of Defendants website
17 since at least March 2002 when they were contacted by Ravi Lahoti. [DF 129.] The
18 evidence shows that Plaintiffs took wide ranging immediate action. [DF 130
19 (registration of DrivingLinks.com domain; efforts to recover domain name).]
20 Plaintiffs' suggestion to the Court that these occurrences were "mere coincidence"
21 are not plausible. And, Plaintiffs again visited DMV.ORG in 2003, at which time
22 they complained to the Overture advertising network about DMV.ORG. [DF 131.]

23 Yet, Plaintiffs have waited over four years to bring this action. See e.g.
24 Grupo Gigante SA DE CV v. Dallo & Co., Inc., 391 F.3d 1088, 1101, 1105 (9th Cir.
25 2004) (finding laches based on four year delay).³

26 _____
27 ³ Moreover, the limitation periods on a false advertising claim is the analogous
28 state statute of limitations. "The analogous limitations period is California's
period for fraud, which is three years." Jarrow Formulas, Inc. v. Nutrition
Now, Inc., 304 F.3d 829, 838 (9th Cir. 2002).

1 **Acquiescence:** Plaintiff TrafficSchool.com was advertised on the
 2 DMV.ORG website in 2003 and Plaintiffs sought to have and did have their services
 3 advertised on the DMV.ORG website in the Spring/Summer of 2006. [DF 131-132,
 4 135-136.] During this time, Plaintiffs made no objection to Defendants' website.
 5 Instead, Plaintiffs acknowledged that Defendants were doing "a fantastic job
 6 marketing" the Website and indicated that they hoped to become "DMV.ORG's
 7 premiere California online driver's ed program and behind-the-wheel provider in
 8 Los Angeles." [DF 133-134.]

9 This conduct constitutes acquiescence. See e.g. Ambrosia Chocolate
 10 Co. v. Ambrosia Cake Bakery, Inc., 165 F.2d 693, 694-95 (4th Cir. 1947)
 11 (acquiescence found where plaintiff tried to sell ingredients to defendant, saying in a
 12 "friendly epistle" that the fact that defendant used the same mark "increased our
 13 interest" in selling to defendant).

14 **Prejudice to Defendants:** "The prejudice that the doctrine of laches is
 15 designed to prevent occurs when a defendant, by reason of a plaintiff's delay, is or
 16 will be worse off than he would have been if the plaintiff had enforced his rights in a
 17 timely fashion." Transworld Airlines, supra, 913 F.2d at 696.

18 Since 2002, Defendants' have developed, significantly invested in, and
 19 promoted their website, turning it into a profitable enterprise. Since 2002,
 20 Defendants have spent over \$10 million on search engine advertising for the
 21 promotion of the DMV.ORG website and over \$500,000 on content development of
 22 the DMV.ORG website. [DF 138-139.] And through these efforts, DMV.ORG has
 23 become recognized as a good resource for motor vehicle related information, with
 24 nearly 70,000 internet links to DMV.ORG. [Defs' DF, 140.]

25 Had Plaintiffs filed this lawsuit when they first learned of Defendants'
 26 website, the impact to Defendants business would have been significantly less.
 27 Thus, Defendants will be prejudiced, as they will be worse off than they would have
 28 been had Plaintiffs brought this action in a timely fashion. Id.; see e.g. Grupo

1 Gigante, 391 F.3d at 1105 (prejudice found where defendant built business during
2 the four years that the plaintiff delayed the exercise of its legal rights).

3 Given the facts demonstrating delay, and both of the alternative second
4 prongs, acquiescence and prejudice, the doctrine of laches should be held to bar any
5 form of recovery for Plaintiffs.

6 **7. The Ninth Circuit Applies Equitable Defenses In Lanham Act Cases**

7 Ninth Circuit case law makes clear that equitable defenses are trumped
8 only where the related causes of action raise allegations concerning a threat to
9 public safety and well being. Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d
10 829, 841 (9th Cir. 2002) (affirming summary judgment against plaintiff's false
11 advertising claim based on laches, finding that "the public's interest will trump
12 laches only when the suit concerns allegations that the product is harmful or
13 otherwise a threat to public safety and well being"). Additionally, even where an
14 injunction is necessary to protect the public, an award of damages may still be
15 denied. ProFitness Physical Therapy Ctr. v. Pro-Fit Orthopedic and Sports Physical
16 Therapy P.C., 314 F.3d 62, 68 (2d Cir. 2002).

17 Plaintiffs' false advertising claims relating to DMV.ORG raise no
18 reasonable concern for public safety or well being. Accordingly, the equitable
19 defenses foreclose both damage and injunctive relief claims.

20 **8. Remedy**

21 **8.1. Plaintiffs Are Not Entitled To Any Monetary Relief**

22 15 U.S.C. § 1117 provides that monetary relief is for the purposes of
23 "compensation and not a penalty." Plaintiffs have failed to show any evidence that
24 DMV.ORG has caused them injury requiring compensation. Century 21 Real Estate
25 Corp. v. Re/Max South County, 882 F.Supp. 915, 924-25 (C.D. Cal. 1994)
26 (plaintiff's false advertising claim failed since it could not prove "a logical causal
27 connection between the alleged false advertising and its own sales position";
28 plaintiff's "mere subjective believe that he will be injured" deemed insufficient);

1 Nikkal Industries Ltd., supra, 735 F.Supp. at 1238 (verdict for defendant; plaintiff
 2 failed to prove lost sales were the result of defendant's advertisements rather than
 3 other factors such as its marketing strategy and increased competition).

4 Plaintiffs' unclean hands and laches also bar any damage award.
 5 ProFitness Physical Therapy Ctr., supra, 314 F.3d at 68.

6 Even setting aside the equitable bar, Plaintiffs' referral business is only
 7 nominal. Accordingly, if the Court finds that plaintiffs have established some causal
 8 relationship between DMV.ORG and their purported injuries, an award of damages,
 9 if any at all, should be nominal as well. Highway Cruisers of Cal. v. Sec. Industries,
 10 374 F.2d 875, 876 (9th Cir. 1967) (awarding nominal damages of \$1 since no
 11 evidence that plaintiff suffered any damages and plaintiff's loss would not be fairly
 12 measured by an accounting of defendant's profits); Downtowner/Passport Intern.
 13 Hotel v. Norlew, 841 F.2d 814, 220 (8th Cir. 1988) (awarding only nominal
 14 damages because anything greater would be based on "sheer speculation").

15 If the Court finds that plaintiffs are entitled to more than nominal
 16 damages, the only theory of recovery ever articulated by plaintiffs is disgorgement
 17 of ten percent of defendants' profits on traffic school and driver's education in
 18 California, Florida, and Texas since October 2006. [Pre-Trial Conf. Hearing,
 19 10/16/2007, 13:19-15:12.] To the extent that plaintiffs advocate some theory of
 20 damage other than what has been articulated, it was never disclosed to defendants as
 21 required by Fed. R. Civ. P. 26(a)(1)(C).

22 An accounting of profits is not available as a matter of right, but rather
 23 is subject to equity. 15 U.S.C. § 1117; Maier Brewing Co. v. Fleischman Distilling,
 24 390 F.2d 117, 120 (9th Cir. 1968). Courts evaluating whether such an accounting is
 25 appropriate take into consideration the intent of the alleged wrongdoer, and require
 26 willful and deliberate wrongdoing. Maier Brewing Co., 390 F.2d at 124; Alpo
 27 Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 961 (D.C. Cir. 1990); Bandag,
 28 Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 919 (Fed. Cir. 1984) (accounting

1 may be denied absent showing of fraud or loss of "substantial business and profits").

2 As discussed above, Plaintiffs have failed to prove that Defendants
3 willfully or deliberately intended to confuse consumers through the DMV.ORG
4 website; rather, the evidence is to the contrary (section 3.3 *infra*). As a result, an
5 accounting of profits is not justified. See Lindy Pen Co., Inc. v. Bic Pen Corp., 982
6 F.2d 1400, 1406 (9th Cir. 1993); Faberge, Inc. v. Saxony Products, Inc., 605 F.2d
7 426, 429 (9th Cir. 1979); Highway Cruisers of Cal. v. Sec. Industries, 374 F.2d 875,
8 876 (9th Cir. 1967); Contessa Food Products, Inc. v. Lockpur Fish Processing Co.,
9 Ltd., 2003 U.S. Dist. LEXIS 26682, *24 n.9 (C.D. Cal. 2003).

10 If the Court finds that Plaintiffs are entitled to an accounting of profits,
11 plaintiffs are not entitled to "a windfall." Bandag, Inc., *supra*, 750 F.2d at 918;
12 Highway Cruisers, *supra*, 374 F.2d 875, 876 (9th Cir. 1967). Using Plaintiffs' ten
13 percent figure, an award of ten percent of defendants' traffic school and drivers
14 education profits in California, Texas, and Florida could not exceed \$114,403.⁴

15 And even this amount would constitute a windfall to plaintiffs and thus
16 should not be awarded. Ten percent of profits in California, Texas, and Florida, for
17 the period October 2006 to present, must overstate actual damages for at least the
18 following reasons: (a) Plaintiffs suffered no competitive injury in California, Texas,
19 or Florida (where they sell their own courses); (b) notably, Plaintiffs' share of the
20 Texas and Florida markets are substantially smaller than ten percent; (c) even
21 Maronick's unreliable survey showed that, at most, only one-half of visitors even
22 perceived an affiliation, but the ten percent figure would award 100% of such
23 profits; and (d) ignores the substantial changes made to DMV.ORG in
24 December 2006, and May 2007, and July 2007. [DF 9, 19-21, 39 and TE 144.]

25 The suggestion that Plaintiffs have suffered any actual damage is

26
27 ⁴ This number is derived by multiplying defendants' gross revenues for traffic
28 school and drivers ed related advertisements in California, Texas, and Florida
by the average profit per dollar earned (to obtain profits) and then multiplied
by ten percent. [Moretti Trial Decl., ¶¶ 30-31, 33(a)-(d); TEs 647, 680-682.]

1 entirely speculative and unsupported. Plaintiffs' unclean hands, laches, and failure
2 to prove any damages strongly suggest that no damages should be awarded.

3 **8.2. Plaintiffs Are Not Entitled To Any Injunction**

4 In considering injunctive relief, "the law requires that courts closely
5 tailor injunctions to the harm that they address." ALPO Petfoods v. Ralston Purina
6 Co., 913 F.2d 958, 972 (D.C. Cir. 1990). "It is well-settled that the essence of
7 equity jurisdiction has been the power to grant relief no broader than necessary to
8 cure the effects of the harm caused by the violation." Forschner Group v. Arrow
9 Trading Co., 124 F.3d 402, 406 (2d Cir. 1997).

10 In considering this case, Defendants ask this Court to consider the
11 FTC's resolution of a false advertising matter with FreeCreditReport.com. In that
12 matter, in which the affirmative use of the word "Free" was at issue, the FTC
13 required a disclaimer on the website in standard font, but not in as prominent a
14 manner as existing disclaimers on DMV.ORG; notably, FreeCreditReport.com
15 makes no disclaimer of any kind in search engine marketing. [Defs' RJN, Item 3.]

16 Plaintiffs' request for an injunction should be denied, as the DMV.ORG
17 website is not misleading. See In re Circuit Breaker Litigation, 860 F. Supp. 1453,
18 1456 (C.D. Cal. 1994) (aff'd by Westinghouse Elec. Corp. v. Gen Circuit Breaker &
19 Elec. Supply, Inc., 106 F.3d 894 (9th Cir. 1997)) (Where a "defendant has infringed
20 innocently, ceased before judgment and assured the court that it has no intention of
21 infringing in the future, the public needs no protection. In these circumstances,
22 courts usually deny requests for permanent injunctions."). Lisa Warren conceded
23 this point. [DF 75 (logo not confusing).]

24 Importantly, there are several disclaimers at the top and bottom of each
25 page of the website, expressly disclaiming any government affiliation, including:
26 (a) the use of the "Unofficial Guide to the DMV" on the logo at top left of each
27 page; (b) the use of the disclaimer "DMV.ORG is not affiliated with any
28 government agency" below the logo on every page; (c) the use of the prominent title

1 "The Unofficial Guide to the DMV" on all homepages; and (d) the use of the bold,
 2 bottom disclaimer on every page. [DF 39; Ex. A (TE 631).] In addition, many
 3 sponsored listings now include the words "Info" and/or "Unofficial." [DF 61; Ex. A
 4 (TEs 670-671).] DMV.ORG also ceased using state flags on the website
 5 immediately following the request from the state of New York and has never used
 6 any other forms of state indicia such as state seals, drivers licenses, police badges,
 7 etc. (which are used on Plaintiffs' websites). [DF 57, 113, 116.]

8 As stated before, Defendants have no intention to remove the
 9 disclaimers on DMV.ORG or to use any state indicia that could cause confusion.
 10 The Court can accept DMV.ORG's representation, made here and elsewhere, that it
 11 will maintain its current level of disclaimers, specified above. Or, the Court may
 12 also order Online Guru, as manager of DMV.ORG to maintain such disclaimers.

13 If the Court considers any further relief, Defendants propose the
 14 following alternatives, either of which could adequately address any specific
 15 concern that visitors seeking traffic school or driver's education services may
 16 erroneously perceive a material affiliation:

- 17 • Require use of the word "Unofficial" in any search engine marketing
 18 (sponsored listings) that links visitors directly to a traffic school or driver's
 19 education page on DMV.ORG [Ex. A (TEs 670-671 (current examples))]; or
- 20 • Require a clickable disclaimer button adjacent to ads for traffic school and
 21 drivers education that would display a disclaimer specifying that DMV.ORG
 22 is not affiliated with any government agency. [Ex. B (example).]

23 Plaintiffs' demand that this Court either take away the domain name or
 24 impose a splash page upon entry to the site (as used by adult entertainment and
 25 alcohol-related sites) are unreasonable. These forms of injunctive relief are grossly
 26 overbroad since they impact the entire website rather than addressing plaintiffs'
 27 alleged injuries. Such draconian relief would be unprecedented and would destroy
 28 the goodwill that Defendants have cultivated. [DF 141.] Splash pages are

1 uncommon, disrupt a visitor's flow, and in fact confuse website visitors. [DF 142.]

2 Further, splash pages contradict basic principles of web design set forth
3 by, among others, the U.S. Department of Health and Human Services. Specifically,
4 DHHS advises: (a) against the use of unsolicited "pop-ups" because of the
5 annoyance and distraction; (b) "put[ting] a descriptive, unique, concise, and
6 meaningfully different title on each Web page"; and (c) "ensur[ing] that headings
7 are descriptive and relate to the content they introduce." DHHS, Research-Based
8 Web Design & Usability Guidelines, § 2.1 & 9.2-9.4 (2006) (avail. at usability.gov).

9 Plaintiffs' requested relief aims at their goal of "shutting down"
10 DMV.ORG and Online Guru, not at any legitimate remedy.

11 **9. Conclusion**

12 For the reasons set forth above, Defendants request that this Court enter
13 judgment in favor of Defendants in this matter.

14
15 DATED: November 28, 2007

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